United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2030

To be argued by
RICHARD J. OSTENDORF

United States Court of Appeals
FOR THE SECOND CIRCUIT

IN THE MATTER OF THE APPLICATION OF:

WILLIAM JONES, CLARENCE BRRIS, MARY HOBBS, ROBERT CURRY, MRS. EVELYN BROWN, THOMAS HOLMES, MRS. EPPIE JOHNSON, WILLIAM HARRIS, MRS. ALBERTHA JOHNSON, MRS. ROSE WILLIS, MRS. SHARA BROWN, WILLIAM DORY, MRS. ELLA HARRIS, GEORGE ROSTKY and GREAT NECK MANOR CIVIC ASSOCIATION, and all others similarly situated,

Petitioners-Appellants,

v.

MICHAEL J. TULLY, JR. and TOWN OF NORTH HEMPSTEAD,

First Respondents-Appellees,

HECTOR H. GAYLE, Executive Director, BERNARD GARTLER, Chairman, JOSEPH CECI, DR. CURTIS KENDRICK, LOCAL URBAN RENEWAL PLANNERS,

JAMES E. LYNN, Secretary, DEPT. OF HOUSING AND URBAN DEVELOPMENT,

Third Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR FIRST RESPONDENTS-APPELLEES

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FOR THE SECOND CIRCUIT

Docket No. 74-2030

IN THE MATTER OF THE APPLICATION OF:

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BRIEF FOR FIRST RESPONDENTS-APPELLEES

First Respondent's Statement of Facts

Petitioners, appellants herein, allege that the construction of a proposed moderate income housing project, to

be located at "Spinney Hill", an unincorporated area within the Town of North Hempstead, Nassau County, New York, will be in violation of Federal Law and result in a violation of their constitutional rights. The action was brought pursuant to 28 U.S.C. Sections 1331 and 1343.

The proposed project, 100 units of moderate and low income housing, was first proposed to satisfy a critical need for such housing in an area where the rental vacancy rate is almost non-existent.

Pursuant to the requirements of the Department of Housing and Urban Development, the proposal was developed in accord with the federal law and guidelines to be reviewed under the published criteria. The first respondent caused the project to be reviewed by the Planning Board of the Town of North Hempstead and be the subject of a public hearing held within the community affected. Over 200 people appeared, with the overwhelming majority in favor of the proposal.

Thereafter, upon duly published notice, the Town Board of the Town of North Hempstead caused a public hearing to be held on June 13, 1972. At this time extensive testimony was taken from the over 200 people present at the hearing. At the conclusion of the hearing the Town Board formerly concluded that the housing in the area in question was substandard and that the project proposed was in the best interests of the residents of the community. These hearings complied with the requirements of 42 U.S.C. Section 1455(d).

Thereafter in September, 1972, the Department of Housing and Urban Development granted approval to the proposed housing project. This approval was in conformity with the requirements of 42 U.S.C. Section 1451(e) and Section 3608(d)(5). This latter section, the Civil Rights Act of 1968, was further complemented by the regulations under 24 C.F.R. Part 511. Petitioners in July,

1973, commenced this action, some 13 months after the Town approved and nine months after H.U.D. approval, upon the vague, unsupported grounds proffered to the District Court.

The District Court in August, 1973, directed petitioners to file a formal complaint with H.U.D. who in November, 1973, filed a detailed report, compiled after extensive review, denying petitioners' claims.

This referral and review was done over the objections of the first and second respondents who contended then and still contend that the petitioners are guilty of laches, failed to state a cause of action and were barred by the appropriate four (4) month New York Statute applicable to judicial review of administrative actions.

Thereafter, federal respondents moved for summary judgment, based upon the formal review and report of H.U.D. The motion was granted by the District Court and the Instant appeal lies from the order entered thereon. The matter in the lower court is reported at 378 Fed. Supp. 286.

POINT I

No appealable issue has been demonstrated with respect to the administrative determination reviewed by the District Court.

The standard of review of administrative acts and decisions is limited in scope and courts may not usurp the power of review beyond such limitations. *Rizzi* v. *Murff*, 171 Fed. Supp. 363 (S.D.N.Y. 1959); *N.L.R.B.* v. *Pinkerton's National Detective Agency, Inc.*, 202 F. (2d) 230 (CA 9th 1953). It follows, therefore, that courts will only pass on questions as to (a) whether the administrative agency has acted within its constitutional or statutory powers, and (b) whether the agency's order or determination is supported by "substantial evidence" or whether its

action has been reasonable and not arbitrary. *Erie-Lackawanna R. Co.* v. *United States,* 279 Fed. Supp. 316 (S.D.N.Y 1967), modified on other grounds, 389 U.S. 486 (1968). The judicial branch then will not interfere with the administrative determination unless the agency has exceeded its jurisdiction, failed to follow a procedure which satisfies elementary standards of fairness, *Dismuke* v. *United States,* 297 U.S. 728 (1936), or the administrative body failed to take action pursuant to statutory procedures prescribed by the legislature. *Love* v. *United States,* 108 F. (2d) 43 (CA 8th 1939), cert. denied 309 U.S. 673.

A review of the record in this respect indicates that the Court found that the First and Second Respondents' application for funding under the Neighborhood Development Program was evaluated under the procedures set out in Housing and Urban Development's NDP Project Selection System, 24 CFR §§ 511, *et seq.* (page 470).

Since the actions taken by HUD, the Third Respondent herein, were in strictest conformity with the provisions in its Project Selection System, 24 CFR §§ 511, *et seq.*, it follows that the court below did not err in its affirmation unless HUD's determination was ". . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law", 5 U.S.C. 706 (2)A, or was "unsupported by substantial evidence." 5 U.S.C. 706 (2)F. The standard of review for informal agency action as in the instant case has been defined by the United States Supreme Court in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 91 S. Ct. 814 (1971), where it was stated:

> "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . [citation of cases] . . . although this inquiry into the facts is to be searching and careful, *the ultimate standard for review is a narrow one.* The court is not empowered to substitute its judgment

for that of the agency." (Emphasis added) 401 U.S. at 416

It would appear then that even after an affirmative showing of conformity with procedural requirements, review of administrative agencies remains narrow. *Mulry* v. *Driver,* 366 F. (2d) 544 (CA 9th 1966). The Second Circuit has followed the mandate of *Overton Park* and has applied the same test of judicial review to determinations of HUD previous to the instant litigation. *Schicke* v. *Romney,* 474 F. (2d) 309 (CA 2nd 1973).

An administrative finding which is deemed "arbitrary and capricious" within the Administrative Procedure Act, 5 USC 706(2)A, has been defined as a determination not supportable by a rational basis. *Carlisle Paper Box Co.* v. *NLRB,* 398 F. (2d) 1 (CA 3rd 1968). The actions and recommendations of HUD in the instant case have not been without any rational basis or foundation. The procedures followed by HUD in approving the Spinney Hill Project have themselves demonstrated a rational plan, comprehensive behind the administration actions challenged by petitioner. 24 CFR §§ 511, *et seq.*

The prerequisites include affidavits of HUD officials that the Project was evaluated in strict conformity with its selection system. These officials of HUD stated they reviewed and considered among other factors (1) Urban Renewal plans submitted by the Town; (2) support of numerous community groups and area residents expressing their support at two public Town meetings in 1972; and (3) a need for housing in the Town, as evidenced by an extremely low vacancy rate of 2.27%. Further, in this evaluation HUD utilized reports of the Equal Opportunity Division which included extensive data on racial composition in the Town and the Spinney Hill Project area. Clearly, the lengthy and comprehensive record upon which HUD made its determination provides more than some rational and substantive basis to sustain its findings.

The court below did not give a rubber stamp approval to the administrative agency's findings. The extent and quality of the record upon which HUD based its decision negates any inference that the findings were "arbitrary" and "capricious" within the purview of the Administrative Procedure Act, 5 USC §706(2)A; *Louisville & N.R. Co.* v. *United States*, 268 Fed. Supp. 71 (DC Ky. 1967); *Smith & Solomon Trucking Company* v. *United States*, 255 Fed. Supp. 243 (DC N. J. 1966); *Irvin* v. *Hobby*, 131 Fed. Supp. 851 (DC Iowa 1955). Petitioners were given full opportunity by the court to rebut the HUD report. Nothing was proffered (see Point II).

Similarly, HUD's determination was based on "substantial evidence" in the record before it. "Substantial evidence" in administrative proceedings has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *John W. McGrath Corp.* v. *Hughs*, 264 Fed. (2d) 314 (CA 2nd 1959), cert. denied 360 U.S. 931 (1959).

It is respectfully submitted that the record below manifests the supportive evidence behind the administrative determination challenged on appeal here and represents a great deal more than a scintilla and is such relevant evidence as a reasonable mind might accept as adequate to support its conclusions. *United States ex rel. Lindenau* v. *Watkins*, 73 Fed. Supp. 216 (S.D.N.Y. 1947); rev'd on other grounds 164 Fed. (2d) 457 (CA 2nd 1947).

In challenging HUD's determination, petitioners are assigned a heavy burden of proof. Indeed, it is a familiar rule of law that there attaches to a determination of an administrative agency a presumption of existence of facts justifying the determination, and the burden of proof falls on the party challenging the agency's ruling. *Lewes Diary, Inc.* v. *Freeman*, 401 Fed. (2d) 208 (CA 3rd 1968); *United Black Fund, Inc.* v. *Hampton*, 352 Fed. Supp. 898 (DC DC 1972); *Irvin* v. *Hobby, supra; American Export Lines, Inc.* v. *Dredge Admiral*, 254 Fed. Supp. 1 (S.D.N.Y. 1966).

Since petitioners did not begin to meet their burden in this respect, it follows that the lower court did not err in its dismissal of petitioners' complaint.

Similar in this respect is the inherent caution by a court in overturning administrative findings when such findings are the product of a highly specialized body with particular skills and expertise. In reviewing the record then, it is not the province of the court to substitute its judgment for that of the administrative agency properly authorized by Congress to exercise rule-making functions in areas where that agency possesses a unique expertise. *Borden Co.* v. *Freeman,* 256 Fed. Supp. 592 (DC N.J. 1966), aff'd 369 Fed. (2d) 404 (CA 3rd 1966); *United States* v. *Great Northern Ry. Co.,* 337 Fed. (2d) 243 (CA 3rd 1964); *NLRB* v. *Brown,* 380 U.S. 278 (1965). Since for purposes of uniformity and consistency, and in light of the special competency of HUD in this field, the power to determine questions entrusted to the specialized knowledge of the agency by Congress is transferred in the first instance from the court to the agency. *Schwartz* v. *Bowman,* 244 Fed. Supp. 51 (S.D.N.Y. 1965), aff'd 360 Fed. (2d) 211 (CA 2nd 1966), cert. denied 385 U.S. 921. It follows, therefore, that even if petitioners met their burden of proof challenging this administrative ruling, the record indicates nothing that would suggest the decision was so arbitrary or irrational as to negate the considerable expertise which HUD possesses in such matters.

In conclusion, the function of the District Court in reviewing the action of an administrative agency is not to substitute its opinion for that of the agency duly authorized to administer its affairs, but to determine whether or not the agency has abused its authority, or deprived one of a substantive right, or that the agency has failed to fulfill all rules, laws and regulations under which it functions. *Suess* v. *Pugh,* 245 Fed. Supp. 661 (N.D. W. Va. 1965); *United States* v. *Morton Salt Co.,* 338 U. S. 632 (1950); *United States* v. *Sundstrom,* 359 Fed. Supp. 1252 (S.D.N.Y. 1973).

Petitioners have wholly failed to demonstrate cause for overturning the administrative finding challenged here by failing to carry the heavy burden to show why said determination is either "arbitrary and capricious" as without any rational basis or was not based on the substantial weight of evidence upon the record. Further, petitioners have demonstrated that nothing necessitates the drastic measure overturning a decision of an agency whose decisions are presumed in law to be correct. *Schwartz* v. *Bowman, supra,* and an agency whose expertise in such fields must be accorded its due weight.

Mr. Justice Bartels in the court below observed:

> ". . . After closely scrutinizing the allegations of racial discrimination, *Southern Christian Leadership Conference* v. *Connolly,* 331 F. Supp. 940 (E.D. Mich. 1971), the court concludes that (1) there was no intentional discrimination; (2) HUD's discretion was properly exercised within the framework of the national policy against discrimination in federally funded housing; (3) the record establishes that HUD through its Project Selection System investigated, weighed and balanced all the relevant factors; and (4) its judgment was an informed one without clear error and fully satisfied the requirements of Section 706 of the Administrative Procedure Act."

POINT II

Petitioners have not presented any evidence in support of an alleged violation of Federal law or deprivation of Constitutional rights.

The lower court in its opinion concluded in part:

> ". . . In applying the Administrative Procedure Law framework, the court had before it and examined in depth the administrative record. It directed its at-

> tention to HUD's formalized fact-finding procedures, its report, the affidavits of HUD officials involved in the approval of the project and the investigative report made pursuant to the petitioners' administrative complaint. *The court also noted the failure of the petitioners to supply affidavits presenting a factual issue as contrasted to their opinions.*" (Emphasis added) (page 481)

It should be noted that throughout the entire course of the litigation involving the proposed project, petitioners have offered no factual evidence to sustain their contentions. Petitioners have merely set forth their opinions and conclusions and asked the court to adopt them as findings of fact.

The court below, and now this court on appeal, is being asked to find some basis to justify petitioners' unique opinions without any factual posture in the record before the court. The record is clear that the court below had ample evidence before it to sustain the dismissal of the action, notwithstanding petitioners' beliefs and views. Petitioners' replies in each instance consisted only of counsel's affidavits which had no probative value.

It would appear that petitioners are in conflict with the requirements of Rule 56(e), Rules of Federal Procedure, which require that facts in opposition to a motion for summary judgment be presented to the court. This failure by petitioners to present factual opposition to respondents' motion has waived the rule which might require liberal construction of their pleadings. *International Longshoremen's and Warehousemen's Union* v. *Kuntz*, 334 Fed. (2d) 165 (CA 9th, 1964); *Applegate* v. *Top Associates, Inc.*, 425 Fed. (2d) 92 (CA 2nd, 1970).

It was incumbent upon petitioners to rebut the evidentiary material and the facts contained in the report of HUD and in the supporting affidavits submitted in behalf of re-

spondents' motion(s) for summary judgment. *Jacobson* v. *Maryland Casualty Co.*, 336 Fed. (2d) 72, 75 (CA 8th, 1964); cert. den. 379 U.S. 964, 85 S. Ct. 655. Indeed, the court below was obliged to construe any inference of fact against the respondents in the motion for summary judgment. *United States* v. *Diebold, Inc.*, 369 U.S. 654; 82 S. Ct. 993 (1962). The court, after recognizing this posture, unqualifiedly found the facts sustained summary judgment for respondents.

The lower court found the sworn statements of fact in support of the motion were uncontroverted. The facts set forth in respondents' affidavits must be taken as true. *Echaide* v. *Confederation of Canada Life Ins.*, 459 Fed. (2d) 1377 (CA 5th, 1972). The District Court ". . . after closely scrutinizing the allegations of social discrimination . . ." (page 478), found that respondents had clearly sustained the burden placed upon them by the Rule. In view of this finding by the court, it is submitted that petitioners do not now present a proper question for review by this court.

The material facts as to the location, size, scope and nature of the proposed project are not . d were never in dispute. What is in apparent conflict is the disagreement between the "unique" conclusions of the petitioners and those reached by everyone else involved in the litigation with respect to the housing conditions for low and middle income persons within the Town of North Hempstead. Summary judgment was a proper remedy for the court below to apply, based upon the cumulative evidence and the multitude of facts present before the court.

It should be further noted that the decision of the lower court was made after full opportunity for submission of factual material by all parties to the court and after consideration of the oral argument of the petitioners and the respondents. Sufficient indulgence was granted petitioners in the within matter to present their view and facts to the court. *Garcia* v. *American Marine Corp.*, 432 Fed. (2d) 6

(CA 5th, 1970); *Miller* v. *Western Pacific Board of Adjusters, Inc.*, 427 Fed. (2d) 175 (CA 9th, 1970); *Missouri Pacific R. Co.* v. *National Milling Co.*, 409 Fed. (2d) 882 (CA 3rd, 1969).

The respondents demonstrated the regularity of the actions of the First, Second and Third Respondents, respectively, in planning, designing, reviewing and approving the proposed project in the motion for summary judgment. Petitioners could not hold back any contrary evidence until trial, but were required to show a genuine issue of material fact. *Donnelly* v. *Guion*, 467 Fed. (2d) 290 (CA 2nd, 1972); *Applegate* v. *Top Associates, Inc., supra; Engl* v. *Aetna Life Ins. Co.*, 139 Fed. (2d) 467 (CA 2nd, 1943).

The conclusions and findings of the lower court are in full accord with the evidence adduced. Petitioners herein are attempting to create a new standard within the Federal Judicial System, to wit, charge a body with an alleged violation of petitioners' civil rights and then require those charged to "prove their innocence." *United Fruit Co.* v. *Cardillo*, 104 Fed. Supp. 81 (S.D. N.Y., 1952).

This concept of petitioners is unacceptable under our laws. Governmental action must be known, predicated upon substantial need or fact and equally applicable to all persons. The District Court found the actions of each of the respondents sustained the awarding of summary judgment.

CONCLUSION

The within appeal is totally without merit and should be dismissed.

Respectfully submitted,

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Hector H. Gayle, Executive Director, Bernard Gartleret al.,
James E. Lynn, Secretary , Dept., of Housing and
Urban Development,
Third Respondent-Appellee.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:
Nathan Chambers
, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 510 Atlantic Avenue, Brooklyn, New York
That on Dec 11, 1974 , he served 2 copies of brief

on Robert Rivers, Esq.,
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by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Nathan Chambers

Sworn to before me this
11th day of December , 1974

John J Bryant

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